5-14-2013

Wicklund v. State Appellant's Brief Dckt. 40269

IN THE SUPREME COURT OF THE STATE OF IDAHO

JUSTIN ROBERT WICKLUND, Petitioner-Appellant, v. STATE OF IDAHO, Respondent.	)	NO. 40269 TWIN FALLS COUNTY NO. CV 2012-1112 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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STATEMENT OF THE CASE

Nature of the Case

Justin Wicklund appeals, challenging the district court's order denying his petition for post-conviction relief after an evidentiary hearing. He contends that the evidence presented at the evidentiary hearing demonstrated that his trial counsel had provided ineffective assistance either by failing to properly investigate, and/or by failing to present to the district court mitigating evidence, in regard to a prior charged offense. Specifically, the evidence presented to the district court (which went unrebutted by the State) showed, by a preponderance of the evidence, that the prior charge was dismissed because the evidence contradicted the complaining witness's claim. The evidence also demonstrated that trial counsel's failure to properly investigate the prior charge and/or present that information to the district court prejudiced Mr. Wicklund because the district court relied on the similarities between that prior charge and the charge in the current case to justify imposing a harsher sentence in the current case. As such, because the preponderance of the evidence shows that Mr. Wicklund's trial counsel provided ineffective assistance, the district court's order denying Mr. Wicklund's petition for post-conviction relief was erroneous. Therefore, this Court should reverse that decision and remand the case so that Mr. Wicklund may be afforded the appropriate relief.

Statement of the Facts and Course of Proceedings

In his underlying criminal case, Mr. Wicklund pled guilty to aggravated battery and aggravated assault. (R., p.31.) He was sentenced to a unified term of twelve years, with two years fixed, and a unified term of five years, with two years fixed, respectively. (R., p.31.) The sentences were ordered to run consecutively for an aggregate sentence of seventeen years, with four years fixed. (R., p.31.) The Court of Appeals affirmed those sentences on direct appeal in Supreme Court Docket No. 38697. *State v. Wicklund*, 2011 Unpublished Opinion No. 757 (Ct. App. 2011). Mr. Wicklund subsequently filed a petition for post-conviction relief. (R., pp.5-16.)

In his verified petition and affidavit, Mr. Wicklund made several claims for relief. (R., pp.5-16.) One of those claims asserted that he had received ineffective assistance from trial counsel because trial counsel had not sufficiently investigated or presented information to the district court relating to a previous charge from 2009 (*hereinafter*, the 2009 charge).[1] (R., p.14.) For example, trial counsel confused the facts of that case with those in the case at issue. (*See* R., p.9; Tr., Vol.4, p.21, L.16 – p.22, L.14.)[2] He also asserted that the district court had relied on a misunderstanding of the actual

[1] That case was dismissed by the prosecutor. (Petitioner's Exhibit 3.)

[2] The transcripts in this case are contained in four separately bound and paginated briefs. To promote clarity, "Vol.1" will refer to the volume containing the transcripts of the status hearing held on May 29, 2012, and the pretrial conference held on July 3, 2012. "Vol.2" will refer to the volume containing the transcript of the evidentiary hearing held on July 23, 2012. "Vol.3" will refer to the volume from the direct appeal containing the transcript of the change of plea hearing held on January 3, 2011. "Vol.4" will refer to the volume from the direct appeal containing the transcript of the sentencing hearing held on March 18, 2011. As Vol.3 and Vol.4 were prepared for Mr. Wicklund's direct appeal, a motion for the Supreme Court to take judicial notice of those transcripts from the direct appeal file for this appeal has been filed contemporaneously with this brief.

details of that prior charge at sentencing, improperly using it to justify a harsher sentence in the case challenged on post-conviction. (R., p.14.) He also moved for appointment of counsel, which the district court granted. (R., pp.17-21.)

The district court subsequently filed a notice of intent to dismiss the petition, but did find that Mr. Wicklund had presented a meritorious claim in regard to trial counsel's investigation of the 2009 charge. (R., pp.40-42.) At that time, the district court took judicial notice of various documents and hearings from the underlying case, specifically, the plea agreement, the Guilty Plea Advisory Form, the change of plea hearing, the sentencing hearing, the judgment of conviction, the order denying Rule 35 relief, and the presentence investigation report (*hereinafter*, PSI). (R., pp.30-31.) Transcripts of the change of plea and sentencing hearings were prepared for the direct appeal. After Mr. Wicklund responded to the notice of intent to dismiss (R., pp.57-65, 67-75), the district court dismissed the remaining claims from the petition and set an evidentiary hearing for the claim regarding the 2009 charge. (R., pp.90-91.)

At the evidentiary hearing, Mr. Wicklund presented testimony from the attorney who had represented him in regard to the 2009 charge. (Tr., Vol.2, p.10, L.5 - p.19, L.20.) That attorney testified that his investigation of the 2009 charge revealed several witnesses who contradicted the complaining witness's version of events. (Tr., Vol.2, p.16, Ls.10-11.) He also testified that the medical records also did not support her story. (Tr., Vol.2, p.17, Ls.13-16.) Furthermore, that attorney testified that he had presented this information to the prosecutor, and the impression he got from the prosecutor was that the complaining witness was not very credible. (Tr., Vol.2, p.16, Ls.4-10.) That attorney testified "once I showed [the prosecutor], I think, affidavits and

statements from witnesses, they moved to dismiss." (Tr., Vol.2, p.13, Ls.4-6.) Based on his observations, that attorney believed the State had dismissed the charge because there was no evidence to support the complaining witness's version of events. (Tr., Vol.2, p.13, Ls.2-6).

That attorney also testified that "[if the client] had previously been charged with rape and it [was] dismissed and this is a current rape case, I'd want to know the facts from that [prior] one to see if they help or hurt, and if they help, you'd want to make the Court aware of it." (Tr., Vol.2, p.14, L.22 - p.15, L.1.) The attorney also explained that, based on the facts of these cases, it was a breach of trial counsel's duty to his client to not investigate that prior offense or present the details about that case to the district court. (Tr., Vol.2, p.14, L.19; Tr., Vol.2, p.15, Ls.2-6.)

Mr. Wicklund also testified at that hearing, asserting that the district court had relied on the erroneous impression of the facts of the 2009 case to impose a harsher sentence on him in the challenged case. (Tr., Vol.2, p.24, Ls.4-25.) The transcript of the sentencing hearing indicates that the district court explicitly relied on the affidavit filed in support of the arrest warrant in aggravation when it sentenced Mr. Wicklund:

> I reviewed the affidavit [in support of complaint and warrant for arrest (Petitioner's Exhibit 2)] from Officer Rudner filed April 16, 2009. I recognize that case was dismissed and so it is with due caution that I review the facts set forth in that affidavit, but I take away from the affidavit with my due caution a concern that it was a similar type of situation. It was alleged rough sex, if you will, if not rape, and in particular on page four of that affidavit Mr. Wicklund is quoted or indicated as advising the officer that he has a history of violence and was taking medications for his numerous anger management issues. . . .
>
> There is also a reference to Mr. Wicklund making statements that he used a condom and so forth, so the fact that sex did occur is certainly referenced in the affidavit and I give weight to that, as well as to the factors set forth that the victim in that circumstance, Mary Machelle

> Barnes, was taken into surgery . . . . To me those facts, not withstanding due caution, are established.
>
> The facts here I find are similar. . . . The situation was a violent one. It was one again involving sex. . . . The nature of the harm and the violence done is a significant consideration, the potential for future risk I find is significant, and the potential for societal harm where there have been incidents involving similar behavior with two independent people is also elevated.

(Tr., Vol.4, p.23, L.8 - p.26, L.7.) The State did not call any witness of its own, nor did it offer any other evidence to contradict the testimony given by the attorney who handled the 2009 charge. (*See generally* Tr., Vol.2.)

The district court ultimately denied Mr. Wicklund's claim, reasoning:

> [Trial counsel] did not testify at this evidentiary hearing and therefore what [he] 'knew' or 'didn't know' is entirely speculative. Further, what [he] 'did' or 'didn't do' to investigate the circumstances of the 2009 case is likewise purely speculative. [Mr.] Wicklund was given an opportunity to develop the record in these regards and has failed to do so. This factor is critical in this case because [Mr.] Wicklund contends that [trial counsel] should have done something different at sentencing to provide effective assistance of counsel. The record before this Court does not support [Mr.] Wicklund's assertion.

(R., pp.105-06.) Mr. Wicklund filed a timely notice of appeal from that decision. (R., pp.113-14.) He also filed a *pro se* motion for reconsideration, which the district court denied. (R., pp.116-25, 131.)

ISSUE

Whether the district court erred when it denied Mr. Wicklund's petition for post-conviction relief.

ARGUMENT

The District Court Erred When It Denied Mr. Wicklund's Petition For Post-Conviction Relief

The preponderance of the evidence presented at the evidentiary hearing demonstrates that Mr. Wicklund's trial counsel provided ineffective assistance of counsel, either by failing to investigate the reasons behind the dismissal of the 2009 charge, or by failing to present that evidence to the district court. The preponderance of the evidence also demonstrates that Mr. Wicklund was prejudiced by that unreasonable performance because the district court relied significantly on a misunderstanding of the facts from the 2009 case, explicitly using that case as an aggravating factor when it imposed Mr. Wicklund's sentence. Therefore, the district court erred by denying Mr. Wicklund's petition for post-conviction relief. This Court should reverse that decision and remand this case for further proceedings.

Upon review of a district court's denial of a petition for post-conviction relief when an evidentiary hearing has occurred, Idaho appellate courts will not disturb the district court's factual findings unless they are clearly erroneous. *McKinney v. State*, 133 Idaho 695, 700 (1999) (citing I.R.C.P. 52(a)); *Russell v. State*, 118 Idaho 65, 67 (Ct. App.1990). When reviewing mixed questions of law and fact, the appellate court defers to the district court's factual findings supported by substantial evidence, but freely reviews the application of the relevant law to those facts. *Id.* (citing *Young v. State*, 115 Idaho 52, 54 (Ct. App.1988)). At a post-conviction evidentiary hearing, the petitioner must prove his allegations by a preponderance of the evidence. *State v. Payne*, 146 Idaho 548, 560 (2008); *Dunlap v. State*, 141 Idaho 50, 56 (2004). "A 'preponderance of the evidence' is evidence that, when weighed with that opposed to it, has more

convincing force and from which results a greater probability of truth." *Harris v. Electrical Wholesale*, 141 Idaho 1, 3 (2004).

To prove a claim of ineffective assistance of counsel, the petitioner must show that his attorney's performance fell below an objective standard of reasonableness and that he was prejudiced as a result of that unreasonable performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Estrada v. State*, 143 Idaho 558, 561 (2006). Mr. Wicklund testified that his attorney should have investigated the 2009 case to know why that case had been dismissed (as Mr. Wicklund testified he did not have that information), or should have presented it with his objection to the inclusion of Officer Rudner's affidavit in the PSI, fighting harder to get the erroneous information stricken from the PSI. (Tr., Vol.2, p.20, L.24 - p.24, L.8.) Mr. Wicklund also testified that, as a result of trial counsel's failure to do so, the district court was left with an erroneous impression of the 2009 case, upon which it relied in imposing a harsher sentence upon him. (Tr., Vol.2, p.24, Ls.4-25.)

Counsel has a duty to conduct a reasonable, prompt, and thorough investigation. *Mitchell v. State*, 132 Idaho 274, 280 (1998). To show that counsel has conducted an unreasonable investigation, the petitioner needs to show what information the reasonable investigation would have revealed. *Id.* The courts are to consider not only the evidence known to counsel, but also whether that "known evidence would lead a reasonable attorney to investigate further." *Murphy v. State*, 143 Idaho 139, 146 (Ct. App. 2006). "Moreover, counsel is bound to make reasonable efforts to obtain and review material that the prosecution will probably rely on as evidence." *Id.*

Additionally, part of counsel's job at sentencing is to present mitigating evidence to the district court. *See, e.g., Knutsen v. State*, 144 Idaho 433, 443 (Ct. App. 2007) ("[Counsel's] neglect to pursue the [mitigating evidence] raises a material question regarding the vigor and competence of his counsel's representation."); *State v. Richman*, 138 Idaho 190, 192-93 (Ct. App. 2002); *Vick v. State*, 131 Idaho 121, 125-26 (Ct. App. 1998); *see also State v. Ivey*, 123 Idaho 74, 77 (1992) (holding that where defense counsel "prepared to present mitigating evidence, yet [was] frustrated in its fruition, appellant effectively was denied assistance of counsel"). "A decision not to investigate or present mitigating evidence is assessed for reasonableness, giving deference to counsel's judgment." *Cook v. State*, 145 Idaho 482, 495 (Ct. App. 2008). If a petitioner fails to identify what the mitigating evidence actually was or how it "might have changed the outcome of these proceedings," he fails to prove a claim of ineffectiveness in this regard. *State v. Wood*, 132 Idaho 88, 97 (1998); *Knutsen*, 144 Idaho at 443.

Mr. Wicklund identified the evidence which counsel should have investigated and/or presented as mitigation to the district court through the testimony of his attorney from the prior case. That attorney testified that "The evidence didn't support [the complaining witness's] story, so the State -- once I showed them, I think, affidavits and statements from witnesses, they moved to dismiss." (Tr., Vol.2, p.13, Ls.3-6.) He explained, "[w]e had witnesses who contradicted everything she claimed and my recollection was she came across as mentally unstable for the most part." (Tr., Vol.2, p.16, Ls.10-13.) That attorney also testified that his impression from conversations with the prosecutor was that the prosecutor believed the complaining witness was not

credible. (Tr., Vol.2, p.16, Ls.4-10.) Additionally, that attorney testified that "[if the client] had previously been charged with rape and it [was] dismissed and this is a current rape case, I'd want to know the facts from that [prior] one to see if they help or hurt, and if they help, you'd want to make the Court aware of it." (Tr., Vol.2, p.14, L.22 - p.15, L.1.) He explained that, based on the facts of these cases, it was a breach of trial counsel's duty to his client (*i.e.*, was objectively unreasonable) to not investigate that prior offense or to not present the details about that case to the district court at the sentencing hearing in this case. (Tr., Vol.2, p.14, L.19; Tr., Vol.2, p.15, Ls.2-6.) The State did not offer any evidence to contradict that attorney's impressions or challenge his conclusions about the unreasonableness of trial counsel's investigation. (*See generally* Tr., Vol.2.) Therefore, through that attorney's uncontradicted testimony, Mr. Wicklund proved, by a preponderance of the evidence, that his attorney's performance in failing to investigate the prior charge and/or failing to present it to the district court was objectively unreasonable, satisfying the first prong of the *Strickland* analysis.

The district court held that, because it was not clear from the evidence presented whether or not trial counsel knew about this information, Mr. Wicklund had failed to prove his claim. (R., pp.105-07.) That conclusion is erroneous because in either case, trial counsel's performance was objectively unreasonable. If trial counsel did not know about the reasons behind the dismissal of the 2009 case, he failed to conduct a reasonable investigation of material that the prosecution will probably rely on.[3] *See Murphy*, 143 Idaho at 146. Therefore, that is something that trial counsel "was

bound" to reasonably investigate. *See id.* Alternatively, if trial counsel knew about the reasons behind the dismissal of the 2009 case, he failed to present that mitigating evidence to the district court, which constitutes objectively unreasonable performance. *See, e.g., Knutsen*, 144 Idaho at 443. Therefore, whether or not trial counsel knew about this information is irrelevant – in either case, a preponderance of the evidence demonstrates that his performance was objectively unreasonable.

The preponderance of the evidence also shows the greater probability that trial counsel's unreasonable performance prejudiced Mr. Wicklund. *See Harris*, 141 Idaho at 3. Mr. Wicklund testified that the district court was able to rely on the erroneous impression of the 2009 case, specifically the allegations supporting the initial warrant for arrest without the critical explanation that the evidence did not support those assertions, to impose a harsher sentence on Mr. Wicklund. (Tr., Vol.2, p.24, Ls.4-25.) The record bears out that claim. The district court took judicial notice of the sentencing hearing from the underlying case. (R., pp.30-31.) The transcript of that hearing reveals that the district court explicitly relied on the similarity of the allegations from the 2009 case, contained in Officer Rudner's affidavit in support of a warrant for arrest (Petitioner's Exhibit 2), in its imposition of sentence in the case challenged in post-conviction:

> I reviewed the affidavit from Officer Rudner filed April 16, 2009. I recognize that case was dismissed and so it is with due caution that I review the facts set forth in that affidavit, *but I take away from the affidavit* with my due caution *a concern that it was a similar type of situation.* It was alleged rough sex, if you will, if not rape, and in particular on page four of that affidavit Mr. Wicklund is quoted or indicated as advising the officer that he has a history of violence and was taking medications for his numerous anger management issues. . . .

[3] The prosecution is very likely to rely on a defendant's prior criminal history in its sentencing argument, particularly if there are similar charges in that criminal history.

> There is also a reference to Mr. Wicklund making statements that he used a condom and so forth, so the fact that sex did occur is certainly referenced in the affidavit and I give weight to that, as well as to the factors set forth that the victim in that circumstance, Mary Machelle Barnes, was taken into surgery . . . . *To me those facts, not withstanding due caution, are established.*
>
> *The facts here I find are similar.* . . . The situation was a violent one. It was one again involving sex. . . . The nature of the harm and the violence done is a significant consideration, the potential for future risk I find is significant, and the potential for societal harm ***where there have been incidents involving similar behavior with two independent people is also elevated.***

(Tr., Vol.4, p.23, L.8 - p.26, L.7 (emphasis added).) In fact, the district court's discussion of the 2009 charge constituted nearly half its total comments before imposing sentence. (*Compare* Tr., Vol.4, p.22, L.18 - p.26, L.23 (the entirety of the district court's comments before imposing sentence); *with* Tr., Vol.4, p.23, L.8 - p.26, L.7 (the district court's comments relating to the 2009 charge).) As such, the impact of the district court's misconception regarding the underlying charge clearly impacted its consideration of the sentencing factors in a manner detrimental to Mr. Wicklund. (*See, e.g.,* Tr., Vol.4, p.26, Ls.4-7.) Therefore, a preponderance of the evidence reveals that Mr. Wicklund was prejudiced by trial counsel's failure to investigate the details surrounding the dismissal of the 2009 charge and/or trial counsel's failure to present that information to the district court, thereby satisfying the second prong of the *Strickland* analysis.

A preponderance of the evidence presented (particularly since no evidence was presented in contradiction by the State) shows that there is greater probability that Mr. Wicklund received ineffective assistance of counsel due to trial counsel's objectively unreasonable failure to investigate the details behind the dismissal of the 2009 charge and/or the unreasonable failure to present that evidence to the district court, either or

both of which resulted in prejudice to Mr. Wicklund when the district court relied significantly on a misunderstanding of that case to impose a harsher sentence on Mr. Wicklund. Therefore, the district court erred in denying Mr. Wicklund's petition for post-conviction relief.

CONCLUSION

Mr. Wicklund respectfully requests that this Court reverse the district court's order denying his petition for post-conviction relief and remand for further proceedings.

DATED this 14th day of May, 2013.

BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 14th day of May, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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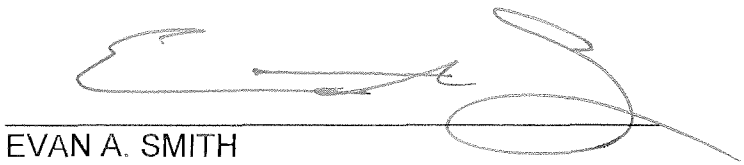

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